America's Best Quality Coatings Corp. and Staff Right, Inc., Joint Employers *and* United Electrical, Radio and Machine Workers of America (UE). Cases 30–CA–11425, 30–CA–11425–2, 30–CA–11425–4, 30–CA–11580, 30–CA–11712, 30–CA–11822, and 30–RC–5250

November 26, 1993

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS DEVANEY AND RAUDABAUGH

On March 1, 1993, Administrative Law Judge Richard H. Beddow Jr. issued the attached decision. Respondent America's Best Quality Coatings Corp. (ABQC), Respondent Staff Right, Inc. (Staff Right), the General Counsel, and the Charging Party each filed exceptions and supporting briefs. The Respondents, the General Counsel, and the Charging Party filed answering briefs, and the Respondents filed reply briefs.

The National Labor Relations Board has considered the decision and the record in light of the exceptions and briefs[1] and has decided to affirm the judge's rulings, findings,[2] and conclusions[3] as modified and to adopt the recommended Order as modified.

1. The judge found it unnecessary to pass on whether the early June 1991[4] conversation between ABQC's labor attorney, Terrance Schuster, and employee Keith Mills constituted a violation of Section 8(a)(1) of the Act. The judge found that such a finding, not alleged in the complaint, would be cumulative. The judge nonetheless proceeded to discredit Mills, finding it unlikely that Schuster would have told Mills wages would go down if ABQC had a union. Finally, the judge concluded that Schuster's question to Mills, a known union supporter, did not violate the Act. In adopting the judge's conclusion that ABQC did not violate the Act, we rely on the judge's discrediting Mills' version of the conversation.

2. The judge found that during the first week of June, Respondent's president, Robert Petersen, interrogated employee Jasper Hicks at his workstation, initiating a conversation about the Union and asking Hicks how he felt about the Union. The judge found that the circumstances of the conversation, i.e., a company president's interrogating an employee at his workstation, tended to show coercion. The judge, however, denied the General Counsel's motion to amend the complaint to include a corresponding allegation of unlawful interrogation because the judge found that such a violation would be cumulative. We disagree with the judge that this violation would be merely cumulative, in view of the president's direct involvement in the unlawful activity. As the judge aptly stated, this incident ''shows that [ABQC], at the highest level of management, was willing to . . . cross the line between casual and coercive conversation in order to attempt to influence the outcome of the forthcoming election.'' Although not alleged in the complaint, this matter was fully litigated at the hearing. Accordingly, we shall grant the General Counsel's motion to amend the complaint to conform to the proof and find that ABQC violated Section 8(a)(1) of the Act.[5]

3. The General Counsel and the Charging Party have excepted, inter alia, to the judge's failure to find Staff

[1] In its answering brief, the Charging Party has moved to strike and/or disregard ABQC's exceptions or, alternatively, to strike ABQC's brief in support of exceptions. The Charging Party contends that ABQC did not comply with Sec. 102.46(b) of the Board's Rules and Regulations inasmuch as ABQC filed a supporting brief in addition to exceptions containing extensive argument and authorities, and, together, the documents exceed the Board's 50-page limit. The Charging Party notes that ABQC did not file a request for permission to exceed that limit, pursuant to Sec. 102.46(j). Further, the Charging Party moves the Board to strike Staff Right's incorporation by reference of ABQC's exceptions and supporting brief into the Staff Right cross-exceptions as similarly failing to comply with the Board's Rules and Regulations.

Sec. 102.46(b)(2) of the Board's Rules states that any exception which does not comply with the requirements of Sec. 102.46(b)(1) ''may be disregarded.'' Although ABQC's and Staff Right's exceptions are not in precise conformity with Sec. 102.46(b), we find that they are in substantial compliance with those requirements. Therefore, we deny the Charging Party's motion.

[2] The Respondents have excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

In the absence of exceptions, we adopt pro forma the judge's decision to overrule Objections 10, 14, and 17, and sustain Objection 21.

[3] The General Counsel has excepted to the judge's failure to conclude that the Respondent violated Sec. 8(a)(1) of the Act when Supervisor Keith Stanosz interrogated employee Robert Person about why Person needed a union. We find it unnecessary to pass on this issue because such a violation, even if found, would be cumulative and have no effect on the remedy.

In sec. III, part C of his decision, the judge credited the testimony of employees Robert Nixon, Calvin Jones, and Timothy Mays, and concluded that ABQC violated Sec. 8(a)(1) when Supervisor Keith Stanosz impliedly threatened them in his remarks concerning their transfer from the ABQC payroll to the Staff Right payroll and also interrogated them about the Union. The judge inadvertently erred in crediting Calvin Jones because Jones never testified at the hearing in this case. We nevertheless agree with the judge, based on the testimony of Mays and Nixon, that ABQC violated Sec. 8(a)(1) by Stanosz' remarks and interrogation.

Also in sec. III, part C of his decision, the judge inadvertently credited testimony of employee Steve Grady in finding that ABQC violated Sec. 8(a)(1) by Supervisor Sheryl Valente's threats to impose more restrictive working conditions on employees if they chose union representation. Grady did not testify. In agreeing with the judge that ABQC so violated the Act, we rely on the testimony of employees Glearon Scott and Jeff Heppe.

[4] All subsequent dates are in 1991 unless stated otherwise.

[5] Chairman Stephens finds it unnecessary to pass on the issue of whether the interrogation of Hicks violated the Act because the finding of such an additional violation would be cumulative and would not affect his decision on the remedy.

Right to be a joint employer with ABQC. The judge found that the relationship between ABQC and Staff Right did not satisfy the test for joint employer status because Staff Right neither performed management services nor exerted significant control over the ABQC employees in a manner that meaningfully affected terms and conditions of employment. The judge concluded that, inasmuch as Staff Right was not a joint employer, the remedy in this case should only involve ABQC. The General Counsel and the Charging Party argue that the Respondents admitted in their answer to the complaint and stipulated at the hearing that they were joint employers during the time period April 1991, to January 3, 1992. The General Counsel and the Charging Party request that the Board find Staff Right jointly and severally liable for the backpay due employees arising from ABQC's unlawful conduct during that time period.

We agree with the General Counsel and the Charging Party that ABQC and Staff Right were joint employers from April 1991, to January 3, 1992, based on the answer to the complaint, as well as the parties' stipulation at the hearing. We agree with the judge, however, that the remedy in this case should involve ABQC alone. In *Capitol EMI Music*, 311 NLRB 997 (1993), the Board held as follows:

> [I]n joint employer relationships in which one employer supplies employees to the other . . . both joint employers [will be] liable for an unlawful employee termination (or other discriminatory discipline short of termination) only when the record permits an inference (1) that the nonacting joint employer knew or should have known that the other employer acted against the employee for unlawful reasons and (2) that the former has acquiesced in the unlawful action by failing to protest it or to exercise any contractual right it might possess to resist it. [Footnote omitted.]

The Board in *Capitol EMI* set forth the following allocation of burdens for determining whether the nonacting joint employer will be held liable for the unlawful actions of the other joint employer:

> The General Counsel must first show (1) that two employers are joint employers of a group of employees and (2) that one of them has, with unlawful motivation, discharged or taken other discriminatory actions against an employee or employees in the jointly managed work force. The burden then shifts to the employer who seeks to escape liability for its joint employer's unlawfully motivated action to show that it neither knew, nor should have known, of the reason for the other employer's action or that, if it knew, it took all measures within its power to resist the unlawful action. [Footnote omitted.]

Ibid.

Applying the *Capitol EMI* standard to the facts of this case, we find that the General Counsel has carried his burden of showing that ABQC and Staff Right were joint employers during the period from April 1991 through January 3, 1992. We also find for the reasons stated by the judge that ABQC violated Section 8(a)(3) by laying off and delaying the recall of the first-shift plating department employees, by suspending and terminating Michael Proffit and Keith Mills, and by terminating Lisa Nixon. Thus, the burden shifts to Staff Right to show that it neither knew nor should have known of ABQC's unlawful actions.

We are satisfied that Staff Right has met this burden because the undisputed evidence shows that Staff Right's role was limited to recruiting and supplying candidates for employment with ABQC, and ''floating'' the cost of ABQC's payroll from April 1991 until January 3, 1992. The decision to hire a candidate was exclusively made by ABQC; once hired by ABQC, all employees worked subject to terms and conditions of employment determined by ABQC alone. Staff Right President Jim Lazear testified that after employees began working at ABQC, Staff Right had nothing to do with their situations at work ''other than provide them a W–2.'' It is clear from the record that Staff Right was never consulted about any of ABQC's decisions to lay off, recall, suspend, or terminate employees. We can infer from the record that Staff Right neither knew nor should have known about ABQC's discriminatory activities. We therefore find that remedying the unfair labor practices found in this case is solely the responsibility of ABQC.[6]

4. The Respondents have excepted to the judge's imposition of a *Gissel*[7] bargaining order. They assert that the judge failed to justify imposition of such an extraordinary remedy by demonstrating that the traditional remedies available to the Board would not ensure that a fair election could be held. We find no merit in the Respondents' arguments.

In agreeing with the judge that a *Gissel* bargaining order is a necessary component of the remedy in this case, we find that Respondent ABQC's course of misconduct, both pre and postelection, clearly demonstrates that the holding of a fair election in the future would be unlikely. In that regard, we note that ABQC's misconduct during the critical preelection period included transferring its employees to Staff Right's payroll on the day after the Union demanded recognition and filed the representation petition, var-

[6] Member Raudabaugh believes that, in a joint employer relationship, each employer is responsible for the unfair labor practices of the other. See his dissenting opinion in *Capitol EMI*. Accordingly, unlike his colleagues, he would find that Staff Right is responsible, along with ABQC, for the unlawful conduct involved herein.

[7] *NLRB v. Gissel Packing Co.*, 395 U.S. 575 (1969).

ious threats and interrogations by Supervisors Stanosz and Valente, unlawfully delaying promised raises and vacations based on the upcoming election, and personal visits by Company President Petersen to employees' work stations. On one occasion, Petersen unlawfully interrogated employee Hicks at his work station about the Union and, on another occasion, Petersen directed employee Mills to remove a prounion sign from his work area even though an antiunion sign remained posted at the nearby work station of employee Torres. Additionally, ABQC ''stacked'' the bargaining unit by hiring new employees in order to dilute the Union's strength.

Furthermore, the unfair labor practices intensified after the inconclusive June 21 election. The course of unlawful conduct included the mass layoff and delayed recall of the first-shift plating employees, the continued withholding of raises and vacations pending resolution of the election objections, only to be followed by the sudden grant of benefits after the mass layoff, and the discharges of prounion employees Michael Proffitt, Keith Mills, and Lisa Nixon.

The coercive effect of the Respondent's misconduct cannot be denied. The transfer of employees from ABQC's payroll to Staff Right's payroll was announced by President Petersen himself and reasonably caused employees to fear that they were no longer ''permanent'' employees of ABQC, but only ''temporary'' employees of Staff Right. When employees questioned Supervisor Stanosz about the change, he advised them that ''they was trying to scare [the employees] off of the Union.'' Thus, the Respondent utilized the transfer device to impress on employees that it controlled their employment to the exclusion of any outside organization that might attempt to improve their working conditions. The impact of this change was magnified by the fact that it was communicated by the Respondent's president and it occurred on the day after the union demanded recognition. See *Astro Printing Services*, 300 NLRB 1028, 1029 (1990).

The discriminatory layoff of all 21 day shift plating department employees, the delayed recall of those with suspected union sympathies, and the unlawful discharges of 3 leading union adherents were also highly coercive and unlikely to be forgotten. This unlawful conduct, which ''goes to the very heart of the Act,'' *NLRB v. Entwistle Mfg. Co*., 120 F.2d 532, 536 (4th Cir. 1941), directly affected approximately one-third of the bargaining unit. The likely result of such action was to reinforce the employees' fear that they would lose employment if they persisted in union activity. *Koons Ford of Annapolis*, 282 NLRB 506, 508 (1986), enfd. 833 F.2d 310 (4th Cir. 1987).

The Respondent's postelection grant of benefits was another highly coercive unfair labor practice. The Respondent utilized a classic ''carrot and stick'' approach, first denying the employees expected wage reviews and paid vacations before the election, and then granting such benefits after the election. As the Supreme Court has long recognized, employees are quick to perceive the ''fist inside the velvet glove'' implicit in such tactics. *NLRB v. Exchange Parts Co*., 375 U.S. 405, 409 (1964). And the Board has noted that unlawfully granted benefits ''are particularly lasting in their effect on employees and difficult to remedy by traditional means . . . not only because of their significance to the employees, but also because the Board's traditional remedies do not require the Respondent to withdraw the benefits from the employees.'' *Triec, Inc*., 300 NLRB 743, 751 (1990), enfd. 946 F.2d 895 (6th Cir. 1991).

We also note that the Respondent impaired the integrity of the Board's election process by hiring, immediately before the eligibility cutoff date, several employees thought likely to vote against the Union. The Respondent's willingness to engage in such unit packing casts serious doubt on whether a fair election could be held.

Finally, we find, contrary to the Respondent's contention, that evidence concerning employee turnover is an irrelevant consideration when assessing the propriety of issuing a *Gissel* bargaining order. See *F & R Meat Co*., 296 NLRB 759 (1989). Furthermore, even assuming that employee turnover would be a relevant factor in an appropriate case, this is not such a case. As the judge noted, there is ''a clear causal connection'' between the turnover in the unit and the Respondent's illegal conduct of laying off the day shift plating department and delaying the recall of employees most likely to have been union supporters. Even courts that examine employee turnover caution that an employer is not to be rewarded for its own misconduct and limit consideration of that factor to cases where the turnover was not of the employer's own making. *NLRB v. Balsam Village Management Co*., 792 F.2d 29, 34 (2d Cir. 1986), enfg. 273 NLRB 420 (1984).[8] Finally, to the extent that some employee turnover occurred that is not the product of the Respondent's un-

[8] The Respondent's reliance on *Impact Industries v. NLRB*, 847 F.2d 379 (7th Cir. 1988), is misplaced. There, the court remanded the bargaining order issue to the Board because it had failed to consider evidence the respondent attempted to present concerning turnover in employees and management during the long time the case was pending at the Board. Here, we have fully considered the evidence the Respondent refers to. Further, in the instant case, the Respondent is not claiming that changes in management occurred, and there is no period of delay comparable to that involved in *Impact*. Furthermore, we note that in its subsequent decision in *Ron Tirapelli Ford v. NLRB*, 987 F.2d 433, 440 (7th Cir. 1993), the court cautioned that in *Gissel* cases the Board must be careful to balance several concerns, including not permitting an employer to profit from its own wrongful refusal to bargain. As discussed above, we find that that is the situation here with respect to the Respondent's reliance on the turnover factor.

fair labor practices, it ''should not be a controlling factor.'' *Justak Bros. & Co. v. NLRB*, 664 F.2d 1074, 1082 (7th Cir. 1981).

In sum, the Respondent's course of misconduct emanated from upper level management, was swift and severe, persisted during the postelection period, and directly affected a substantial proportion of the unit employees. Accordingly, we agree with the judge that the possibility of erasing the effects of the Respondent's unfair labor practices is slight and the holding of a fair election unlikely. Therefore, we conclude that a *Gissel* bargaining order is appropriate.

AMENDED REMEDY[9]

Because of the serious nature of the violations and because the Respondent's egregious misconduct demonstrates a general disregard for the employees' fundamental rights, we find it necessary to issue a broad order requiring the Respondent to cease and desist from infringing in any other manner on rights guaranteed employees by Section 7 of the Act, *Hickmott Foods*, 242 NLRB 1357 (1979), and to bargain with the Union.[10]

Additionally, in the event a bargaining order takes effect without a certification of representative, we shall order that the election held in Case 30–RC–5250 shall be set aside, and that the petition in that matter be dismissed.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, America's Best Quality Coatings Corp., Milwaukee, Wisconsin, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Substitute the following for paragraph 1(b).

''(b) Interfering with, restraining, or coercing its employees in the exercise of the rights guaranteed them in Section 7 of the Act, by interrogating employees concerning their union sympathies, by threatening employees that benefits would be withheld and that it would impose more onerous working conditions, and by telling employees that they were transferred to the payroll of a temporary employment service to scare them off the Union.''

2. Substitute the following for paragraph 1(f).

''(f) In any other manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.''

3. Substitute the following for paragraph 2(a) and reletter the subsequent paragraphs.

''(a) Offer Keith Mills, Michael Proffitt, Lisa Nixon, and all bargaining unit members of the dayshift plating department laid off or terminated on or after July 19, 1991, immediate and full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed, and make them whole for any loss of earnings and other benefits suffered as a result of the discrimination against them, including wage increases and vacation benefits that may have been illegally delayed or not provided, in the manner specified in the remedy section of the judge's decision.

''(b) Remove from its files any reference to the unlawful terminations and layoffs and notify the employees in writing that this has been done and that the terminations and layoffs will not be used against them in any way.''

4. Substitute the attached notice for that of the administrative law judge.

IT IS FURTHER ORDERED that Case 30–RC–5250 is severed from Cases 30–CA–11425, 30–CA–11425–2, 30–CA–11425–4, 30–CA–11580, 30–CA–11712, and 30–CA–11822, and remanded to the Regional Director for Region 30, that the ballots of Robert Husslein, Paul Plonka, Stephen Iggens, Jason Rothwell, and Raymond Tippet be opened and counted by the Regional Director in accordance with the Board's Rules and Regulations, and that he prepare and serve on the parties a revised tally of ballots. If the revised tally in this proceeding reveals that the Petitioner has received a majority of the valid ballots cast, the Regional Director shall issue a certification of representative. If, however, the revised tally shows that the Petitioner has not received a majority of the valid ballots cast, the Regional Director shall set aside the election, dismiss the petition, and vacate the proceedings in Case 30–RC–5250.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

[9] Nothing in this Decision and Order shall be construed as requiring ABQC to rescind any benefits without a request from the Union. See *Vibra Screw, Inc.*, 301 NLRB 371 fn. 2 (1991).

[10] We note that President Petersen's confiscation of prounion literature from employee Mills' workstation was alleged and found to be objectionable conduct. No party filed exceptions to this finding. Inasmuch as this conduct was not alleged to have violated Sec. 8(a)(1), we shall amend the judge's recommended Order to remove the cease-and-desist provision inadvertently included there.

We shall also modify the reinstatement language in par. 2(a) of the judge's recommended Order to conform to that traditionally used by the Board.

To organize

To form, join, or assist any union

To bargain collectively through representatives of their own choice

To act together for other mutual aid or protection

To choose not to engage in any of these protected concerted activities.

WE WILL NOT terminate or lay off any employees or otherwise discriminate against them in retaliation for union activities or other protected concerted activities.

WE WILL NOT interfere with, restrain, or coerce our employees in the exercise of rights guaranteed them in Section 7 of the Act by interrogating employees concerning their union sympathies, by threatening employees that benefits would be withheld and that we would impose more onerous working conditions, and by telling employees they were transferred to the payroll of a temporary employment service to scare them off the Union.

WE WILL NOT delay expected wage increases or reviews and vacations or give such benefits in a manner that interferes with employees' Section 7 rights.

WE WILL NOT promulgate rules or an employee handbook with unilateral changes in terms and conditions of employment without notice to or bargaining with the Union.

WE WILL NOT fail or refuse to recognize and bargain in good faith with United Electrical, Radio and Machine Workers of America (UE) as the exclusive bargaining agent of our employees in the following appropriate unit with respect to rates of pay, hours of employment, and other terms and conditions of employment:

All full-time and regular part-time production and maintenance employees, including warehouse employees of the Respondent, employed at America's Best Quality Coatings Corp. facility in Milwaukee, Wisconsin; but excluding all office clerical employees, professional employees, guards and supervisors as defined in the Act.

WE WILL NOT in any other manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL offer Keith Mills, Michael Proffitt, Lisa Nixon, and all employees of the day shift plating department laid off or terminated on or after July 19, 1991, immediate and full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed, and WE WILL make them whole for any loss of earnings and other benefits suffered as a result of the discrimination against them, including wage increases and vacation benefits that may have been illegally delayed or not provided, in the manner specified in the remedy section of the judge's decision.

WE WILL notify them in writing that we have removed from our files any reference to their terminations and layoffs and that the terminations and layoffs will not be used against them in any way.

WE WILL recognize and, on request, bargain collectively with the Union as the exclusive collective-bargaining representative of our employees in the appropriate unit, with respect to the rates of pay, wages, hours, and other terms and conditions of employment and, if an agreement is reached, embody it in a signed agreement.

WE WILL, on request of the Union, rescind any changes in terms and conditions of employment that were unilaterally made on or after April 18, 1991, and retroactively restore preexisting terms and conditions of employment.

AMERICA'S BEST QUALITY COATINGS CORP.

Gerald McKinney, Esq., for the General Counsel.
Fred G. Groiss and *Jose Luis Martinez, Esqs.*, of Milwaukee, Wisconsin, for the Respondent.
Mary E. Leary, Esq., of Pittsburgh, Pennsylvania, for the Charging Party.

DECISION

STATEMENT OF THE CASE

RICHARD H. BEDDOW JR., Administrative Law Judge. This matter was heard in Milwaukee, Wisconsin, on June 15–18 and August 10–13, 1992. Subsequent to an extension of the filing date, briefs were filed by all parties.[1] These proceedings are based on an original charge filed July 2, 1991,[2] by United Electrical, Radio and Machine Workers of America. The Regional Director's consolidated complaint dated May 1, 1992, embraces numerous additional charges as well as election objections filed June 28, 1991, by the Union, alleging various violations of Section 8(a)(1), (3), and (5) of the National Labor Relations Act which occurred both before and after an election held on June 21.

At the resumption of the hearing on August 10, 1992, Case 30–CA–11822, a complaint, alleging illegal discharge under Section 8(a)(1) and (3) of the Act, was consolidated with the other cases.

On a review of the entire record in this case and from my observation of the witnesses and their demeanor, I make the following

[1] The General Counsel's brief embraces a motion to correct certain errors in the transcript. The corrections requested are appropriate and the motion is granted.

[2] All following dates will be in 1991 unless otherwise indicated.

FINDINGS OF FACT

I. JURISDICTION

Respondent America's Best Quality Coatings Corp. (ABQC) is a corporation engaged in metal plating operations at a Milwaukee facility.

It annually provides services valued in excess of $50,000 for Allen Bradley Corporation, an enterprise in Wisconsin which annually sells and ships goods and materials valued in excess of $50,000 directly to points outside Wisconsin. Respondent Staff Right, Inc. operates an employment service in Milwaukee and provides services valued in excess of $50,000 for other Wisconsin businesses who sell and ship nonretail products valued in excess of $50,000 directly to points outside Wisconsin. It is admitted that at all times material Respondent had been an employer engaged in operations affecting commerce within the meaning of Section 2(2), (6), and (7) of the Act. It also is admitted that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. THE ALLEGED UNFAIR LABOR PRACTICES

ABQC is a closely held Wisconsin corporation with Co-Owners William Nimtz and Joel Lee each being 50-percent stockholders. It began operations in June 1990, after purchasing the then union-organized[3] metal plating operations from Allen Bradley Company and began nonunion operations at the same location and facility almost immediately thereafter with over 99 percent of its metal plating work being performed for Allen Bradley Company.

Staff Right, Inc. is engaged in the business of providing skilled and unskilled blue collar workers in the Milwaukee metropolitan area. It provides these services to numerous employers (many of them unionized), in addition to ABQC.

Staff Right began serving ABQC as a result of a competitive bidding process, and it supplied production and maintenance employees who remained on the Staff Right payroll for 45 days during which time Staff Right was responsible for handling their payroll including making all necessary tax deductions. No particular employees were ever requested by ABQC and it never received any instructions from ABQC as to what should be done as to the position of applicants on unions.

In April 1991, it entered an arrangement with ABQC to ''float'' the cost of the payroll and employees were placed on Staff Right's payroll for this purpose only. This relationship ended in January 1992 and reverted to the recruitment and supply of employees.

Under these circumstances, I am persuaded that the relationship between ABQC and Staff Right does not satisfy the appropriate test for determining joint employer status because Staff Right does not, in conjunction with ABQC, perform management services or exert significant control over the same employees in a manner that ''meaningfully affects matters relating to the employment relationship in firing, discipline, supervision and direction.'' See *Osco Drug*, 294 NLRB 779 (1989). Accordingly, I find that Staff Right is not a joint employer and, in view of conclusions otherwise reached below, I conclude that the remedy sought in this proceeding should involve only Respondent ABQC.

As a new employer located in a ''private enterprise'' or ''development'' zone, ABQC was eligible for certain government tax breaks and wage subsidies, provided residents in that low income area, and certain others, were hired as employees. Thereafter, from June 1990 until at least November 1991, a majority of ABQC's work force consisted of minority employees, most of whom were African-American (black) and Hispanic. Most, if not all, of the aforesaid employees were poor, hard to employ, disadvantaged persons earning under $10,000 annually. The majority of these employees had also been placed at ABQC through Staff Right.

Gene Plonka was ABQC's first president from June 1990 until approximately October 1990 at which time, because of illness, he was succeeded by Robert Petersen. Petersen remained president for approximately 1 year, until November 30, 1991, at which time he was succeeded by the current president, Robert Adikes.

In 1990 employees were hired at $5.50 per hour and promised a 50-cent raise on completion of their probationary periods and periodic raises thereafter in anticipation that on their 1-year anniversary date, they could be earning up to $10 per hour with a 1-week paid vacation. After Plonka became ill in September 1990, Petersen met with the employees and informed them that the probationary period was being changed from 90 to 60 days, that employees would get their 1-week paid vacation and a raise at their 1-year anniversary date, but that the amount of the raises would be determined by a ''rate review.''

In late March 1991, employees became increasingly concerned over the effect of Plonka's terminal illness on promised raises and other personnel matters and employees Michael Proffitt, Keith Mills, Sonny Anderson, Lisa Nixon, Robert Person, Virginia Boyde, and Curits Celske[4] met and designated Celske to contact the Union's field organizer, Beth Levie, about how they should go about forming a union.

Celske then circulated a petition of interest for union representation among Respondent's approximately 62 to 64 employees. The petition, with addresses and telephone numbers, was signed by 33 employees, 15 of which were from the first-shift plating department.

Respondent was made aware of the petition of union interest when several employees showed it to Supervisor Jane Lewandowski, in Petersen's absence, and informed her that they ''wanted to be recognized as a group or as a union and that they wanted to talk to Petersen about some of the conditions and wages.'' Lewandowski replied she was not in a position to answer any of their questions and the petition was returned. Supervisor Keith Stanosz also saw the petition and then asked employee Robert Person why he needed a union.

Union Representative Levie thereafter met with 20 employees and obtained signed authorization cards and by April 18 the Union had secured 34 valid union member-

[3] The Allen Bradley Company employees were represented by Local 1111 of the International Union. Local 1111 is not a party to these proceedings.

[4] Celske was the only nonblack employee in this group, and the only one not working on first shift in the plating department. As of April 18, Respondent's first-shift plating department consisted of 24 employees; 12 of whom were black, 5 of whom were Hispanic, and 7 of whom were Caucasian. Three of these employees, Jacqueline Williams (black), Lee Ramirez (Hispanic), and David Claudio (Hispanic) were nonsupervisory leadpersons.

ship/authorization cards from employees. As of June 21, and prior to the NLRB-conducted election, the Union had secured an additional 10 cards for a total of 44. The introductory portion of the cards read (both in English and Spanish):

> I hereby request and accept membership in the above named union, and authorize it to represent me, and in my behalf to negotiate and conclude all agreements as to hours of labor, wages, and all other conditions of employment.

On April 18, Union Representatives Levie and Bob Clark, together with employees Proffitt, Mills, Nixon, Anderson, Boyde, Jasper Hicks, LeMon Ward, and Robert Person, unsuccessfully demanded voluntary recognition after indicating that a majority of workers had signed union cards. Immediately thereafter, the Union filed a representation petition.

Pursuant to the representation petition and a Stipulated Election Agreement, an election was conducted, on June 21, among employees in the following appropriate unit:

> All full-time and regular part-time production and maintenance employees, including warehouse employees of the Respondent employed at America's Best Quality Coatings Corp. facility in Milwaukee, Wisconsin; but excluding all office clerical employees, professional employees, guards and supervisors as defined in the Act.

The results of the election as set forth in the tally of ballots show that of approximately 72 eligible voters, 30 cast votes for and 29 cast votes against the Union. There were nine challenged ballots which were sufficient in number to effect the results of the election.

Several employees testified that on April 19, the day after Respondent declined voluntary recognition of the Union, Petersen met with all employees and announced that, henceforth and for an indefinite period, employees were being transferred to Staff Right's payroll instead of ABQC's payroll due to ''cash flow'' problems. Petersen, however, testified the effective date of the transfer was actually April 7 and that he was not sure of the date he met with the employees regarding this payroll transfer matter but guessed being ''between April 7 and 12,'' or ''somewhere in that area.'' As a result of the announcement employees became ''very uspset, very scared'' because they felt that they were now ''temporary'' employees of Staff Right, the employment service, instead of having the ''permanent'' status they had attained with ABQC. As ''temporary'' employees, a status most had previously held with Staff Right when first hired, they felt they no longer possessed the job security or protection they had with ABQC. Moreover, as temporary employees, they felt they would no longer be considered trustworthy regarding such things as car loans.

Thereafter conversations and events occurred based on this subject and on other matters concerning the union election which bear on several alleged violations of the Act. These events, as well as certain other events that occurred subsequent to the election, will be discussed in the ''Discussion'' section of this decision.

On July 15, the Union's organizing committee members Proffitt, Mills, and Hicks, were given warnings for alleged poor attendance. They jointly conferred with Union Representative Levie and, on July 17, went as a group to Petersen's office to protest the warnings. They each gave Petersen, in the presence of Supervisor Keith Stanosz, a formal grievance written on the Union's standard grievance form entitled, ''UE Grievance Form.'' Petersen took the grievances from the three employees, but refused to formally accept them, stating Respondent did not recognize the Union.

One or two days prior to July 18, the organizing committee met and drafted a petition demanding promised raises and vacations. It was signed by 29 employees and delivered to Petersen during the 9:10 a.m. workbreak on July 18. Nearly 30 employees went to the area near Petersen's office and gave him the petition together with a document (Exh. 27) which cited various NLRB and court cases supportive of the organizing committee's demand for payment by Respondent of the promised wage increases and paid vacations. Mills, Proffitt, and Nixon were the principal spokesmen. After Mills told Petersen the law provided the employees were entitled to the raises and paid vacations inasmuch as these benefits had been previously promised, Petersen replied the petition and other document ''meant nothing to him and that he was tired of having everyone come to his office.'' He said he would not do anything until the NLRB ruled on the pending union challenges and the objections. Petersen also, as credibly testified to by Keith Mills, referred to the ongoing union activities and told the employees, ''if you [have] an *attitude* you [will not] be getting no raise or . . . vacation.''

Later that morning at about 11:30 a.m., leadman David Claudis informed Supervisor Stanosz that valves had been opened without authorization on several of the plating machines tanks causing acid to drain to a holding area in the basement resulting in an unsafe working condition because the acid storage tank had risen to near its holding capacity. Stanosz feared another such act could result in serious damage to the plant or employees and he said he determined to send the employees home for the remainder of the day. After notifying Petersen, he then punched the timecards of all these first-shift plating department employees and released them from work at 12:30 p.m. Respondent did not contact either the fire or police department, health department, or OSHA. After being told to go home, the majority of the employees went to the nearby union office where the Union was informed of what had occurred.

When the first-shift plating department employees arrived the next day in time for their shift, all except for the three leadpersons, they were denied entry by Petersen. They were then sent a letter saying the first shift was being discontinued until the risk of reoccurring misconduct was eliminated.

On July 22 employees began informational picketing to protest Respondent's apparent lockout. Pickets included employees Mills, Proffitt, Nixon, Boyde, LeMon Ward, Jasper Hicks, Bryan Thompson, and Sonny Anderson and picketing continued for 6 weeks.

On July 27, Petersen sent a letter to all first-shift plating department employees in which he referred to ''present production requirements,'' etc., being the reason for lack of recall, specifically stating:

> This letter is to inform you that due to current production levels in the Plating department, we are unable to bring back the entire work force. We are currently only filling those positions that are needed to satisfy present

> production requirements. These positions are being filled by the most qualified individuals. Unfortunately, current production needs do not warrant recalling you at this time. However, your name has been placed on a preferential recall list and you will be notified when work is available. I regret this current condition of affairs and hope we can get as many employees back to work as soon as possible.

Employees were not recalled based on what machine they had been operating on July 19. From July 19 forward, Respondent utilized the three leadpersons *and* the second-shift plating department employees, and these employees were working as much as 4 hours overtime per day. (Stanosz asserted that they maintained regular hours; however, this is not documented by relevant records available to Respondent.) When Robert Person was recalled on November 7 he believed that he was the first black to be recalled and that first-shift plating employees were working more overtime than they had prior to July 19.

The Respondent also received information assertedly given to Petersen from employees Dan and Dave Roark that Mills and Proffitt were in the area of the tanks that were drained and that they were laughing and referring to getting their vacations at the union hall after being released from work on the July 18. On July 27 both Mills and Proffitt were given letters of suspension pending investigation of the drainage incident. Interviews with Petersen and company counsel were held and claims were made that Respondent had 13 witnesses to place them in the area and that Respondent had 12 sworn affidavits that they were seen causing the acid drain. Both denied any involvement, but they were discharged by letters dated February 24, 1992.

On or about July 27, merit wage reviews and a week of paid vacation were unilaterally awarded to employees and Respondent made admitted changes involving employees' wages, hours, and conditions of employment. Most of the unilateral changes are set forth in Respondent's first-ever employee handbook which issued in early September and Respondent stipulated that all such changes were unilaterally made without notice to, or bargaining with, the Union. The Respondent also applied a drug screening for all recalled employees and, when Nixon's November test resulted in a positive finding, she was discharged.

Sonny Anderson was recalled in December. On July 20, 1992, Anderson had a dispute with Supervisors Habel and Stanosz over a change in his job assignment, Anderson left the workplace after being told by Stanosz that he could leave if he didn't like it. Anderson then called President Adikes who said he had heard of the incident but had not yet had a chance to investigate. The next day Anderson was terminated for ''getting into supervisors' faces'' on July 20.

III. DISCUSSION

The issues in these cases arise from the events surrounding the terminal illness of a startup company's president, employees' concern over anticipated wages and benefits, a union election, the sudden mass layoff of all the first-shift plating employees, and a protracted delay in the recall of laid-off employees, especially those who were union sympathizers.

A. *Ballot Challenges*

Of 68 ballots cast, 30 were for the Union, 29 were against, and 9 were challenged. The Board challenged *Raymond Tippet's* ballot as he was not included in the ''*Excelsior*'' list[5] of eligible voters furnished to the Union. The testimony of Supervisor Lewandowski shows that Tippet was working at the Company prior to the payroll eligibility date and that she accidentally failed to use the updated computer date when she prepared the list. Respondent asserts that it substantially complied and did not act in bad faith, citing cases that indicate such an omission does not warrant a new election. The General Counsel's brief does not address this issue and, inasmuch as Tippet otherwise is within the unit, I conclude that his vote properly may be counted, and the challenge therefore is overruled.

Robert Husslein is alleged to be a supervisor because of his title as ''maintenance supervisor''; however, he is the supervisor only of himself as he is the only one in his department and he is, factually, the janitor (with maintenance-type duties). The fact that he has parking privileges and office access relates to his unusual work hours and duties; otherwise, he performs no supervisory functions. I find he is not a statutory supervisor and that the challenge to his ballot should be overruled.

Al Habel was listed on company charts and in his performance review as second-shift supervisor and no other person with supervisory status was at the plant for most of the second shift. He is salaried, was given a vacation, wears clothing like other supervisors (not the employees' coveralls), has parking privileges, instructs employees on their job duties, has fired and disciplined employees and, prior to the election, was considered by other employees to be a supervisor.

If Habel was not a supervisor (at the time of the election), some 13 employees on the second shift would be unsupervised and an opened, operating plant with an inventory of costly machinery and materials would be functioning for up to 8 hours a day with no onsite supervision. Clearly, Habel was the highest ranking employee on his shift, and his duties subsequently were also designated as supervisory duties by the Respondent when after the election it formally recognized and entitled him as a supervisor and, accordingly, I find that Habel was a statutory supervisor at the time of the election. See *Schnuck Markets v. NLRB*, 961 F.2d 700 at 706 (8th Cir. 1992), and cases cited there. I therefore find that the Union's challenge to his ballot should be sustained.

Kasey Lee Nimtz (also known as Ki-Ki Nimtz) is the daughter of William Nimtz who own 50 percent of Respondent ABQC's stock. She was a student at the University of Wisconsin, Eau Claire, from 1987 to 1989 majoring in business, and thereafter at the University of Gainesville in Florida from 1989 to 1991 majoring in economics. During the summer she would return home and work for Respondent on a full-time basis. She wore slacks, shirts, blouses, etc., but not a uniform as did other bargaining unit employees and she generally worked in the administrative offices. When ABQC first opened, Ki-Ki Nimtz interviewed and hired several of the production and maintenance employees. Prior to the election Nimtz was trained to act as a production planner, assertedly not a front office job and a job also sometimes performed by Ruth Zinns whose ballot also was challenged. Al-

[5] *Excelsior Underwear*, 156 NLRB 1236 (1966).

though Nimtz may have trained for a position that might make her a ''dual function'' employee, it is clear that she did and could exercise supervisory functions as the daughter of the owner, and otherwise the record supports the conclusion that her interests are aligned with management and that she had a lack of community of interest with unit employees. Accordingly, the challenge to her ballot is sustained.

Ruth Zinns is the assistant to Office Supervisor Jane Lewandowski and is now called the office clerk. Prior to and at the time of the election, she had no title but performed these duties for Lewandowski except for a time in April or May 1991, when she spent up to 6 hours a day as a replacement for Production Planner Jackie Kobs. A few weeks prior to the election Ki-Ki Nimtz took over that job. Unlike production employees, Ruth Zinns was employed principally as an office clerk from the period of September 1990 to the present. Like those in management, Zinns parks in the enclosed garage, has keys to the facility, and is a salaried employee. Zinns normally works in the administrative offices area separate from the production and maintenance area, she is not required to wear a uniform, and unlike unit employees, she was entitled to and received a vacation in August 1991. Zinns was authorized to sign documents on behalf of the Company required to be sent to the State for the Private Industry Council. She was also responsible for compiling confidential payroll information such as contained on the ''Employee Rate Master'' which includes employees names, their clock numbers, their shift, rate of pay, hours worked for the month, bonus dollars earned, whether they were entitled to a bonus, and the bonus dollars paid as well as all health insurance forms for employees and management personnel.

Although Zinns may have had a ''dual function'' role in April or May, she left that position well before the election on June 21, and she has functioned principally as an office clerical, a classification excluded from the unit. Moreover, Zinns is a confidential employee who does not share a sufficient community of interest with the bargaining unit workers inasmuch as she works in a physically distinct location with little interchange with production and maintenance employees and has apparent authority to sign commitments for the Employer and to assist in effectuating management policies. Accordingly, the objection to her ballot is sustained.

Inna Strupinsky began work on June 16, 1990. She has a degree in chemistry (from the Soviet Union) and uses this knowledge in her operations in Respondent's waste water treatment department. She is not supervised by anyone connected to the production, warehouse, or maintenance departments. Her duties and responsibilities, since September 1991, include analyzing chemical waste and performing analytical control of all chemical plating waste. Prior to that time, she operated the waste water treatment facility exclusively. She supervised the waste water treatment facility and maintained the necessary levels of chemicals by making the correct additions to achieve the best results for the waste water treatment. In doing so, she communicated with Al Niesen, who was a supervisor and in care of chemical analytical control for the plating facility and also for the waste water treatment along with Strupinsky. Niesen was subsequently replaced with John Harvey and Dave Anderson. Harvey's job was permanently located in the chemical lab as is Strupinsky's, and Anderson is a chemical engineer who is located on the first floor in a special office in the production area where he takes care of the plating facility. Strupinsky gives instructions about the appropriate amount of chemicals to be added for the treatment of the waste water from the plating department to Engineer Anderson; however, she does not deal with any workers in the production department. Strupinsky is salaried, and she earned and received a vacation (2 weeks in 1992). She wears a lab coat, not a uniform, and works in an area and at hours different from those of the production employees.

Under these circumstances, I find that prior to August 1991, Strupinsky's work as a technician (which thereafter evolved to that of a chemist) was that of a professional employee (excluded from the unit description), with specialized skills necessary for the performance of a job as a chemist. Although the chemical analysis that she performs is crucial to the production process, there is no interchange between her and the other employees, and she otherwise lacks a community of interest with the unit employees. Accordingly, the objection to her ballot is sustained.

Paul Plonka, *Stephen Iggens*, and *Jason Rothwell* were all students working as part-time employees at the time of the election.

Plonka is currently employed as a systems analyst at ABQC. He was first employed by the Respondent on June 18, 1990, as a warehouse worker. His father was the initial president of ABQC. Plonka attended Marquette University between 1988 and May 1992 studying organizational management, skills he embraced in his current position with ABQC as a systems analyst. Plonka testified that during a particular period of time, he couldn't ''give you exact times that I worked during that period.'' However, the records for that period reflect that Plonka worked no hours during the week of January 7–12, 1991; no hours during the week of January 28–31, 1991; and again no hours during the week of February 4–9, 1991. Payroll records from December 1990 also show that he only worked 7 hours during the week of December 7, and 6 hours the following week.

While in school, Plonka received time out for spring breaks, time off for exams, and had a flexible schedule to accommodate school needs and other personal needs. If he wanted this same time off from his job he had to tell Supervisor Valente up to 3 days in advance, but when he didn't give 3 days' notice and wanted time off for spring break, it still was approved. Plonka initially earned $5.50 an hour and was evaluated and received a wage increase on August 6, 1991, retroactive to June 18 (3 days prior to the NLRB election held on June 21). As a warehouse worker, Plonka's wage was increased to $6.57 an hour which was only 3 cents less than what full-time leadpersons received.

Iggens was a part-time employee (personally recruited by then President Plonka) from June 18, 1990, through July 7, 1992. He was initially employed as a warehouse employee until the summer of 1991 when he became a dock leadman on July 1. He went back to the warehouse until March 1992 when he became a customer service assistant until the end of his employment on July 7, 1992. All through his employment, Iggens was enrolled as an accounting major at the University of Milwaukee. He initially earned an hourly rate of pay of $5.50 an hour until August 6, 1991, when he received a wage increase to $7.23 per hour retroactive to June 18 (3 days before the election). His work schedule accommodated his academic schedule and, although he had scheduled hours,

he did not always work them. He sometimes stayed overtime and sometimes took leaves of absence.

Rothwell was a part-time employee between May 1991 and May 1992 while a student initially at the University of Wisconsin Milwaukee and later at Waukesha County Technical College in Pewaukee, Wisconsin. He primarily did cleaning in all departments and was supervised by Keith Stanosz. His work schedule accommodated his academic schedule and he would take off for exams.

Although seasonal, casual, or temporary employees may be considered not to have a substantial community of interest with other unit employees, regular, part-time employees are sometimes distinguished from the former category and considered to have sufficient interest in conditions of employment to be eligible to vote. Here, although the three student-employees worked irregular work schedules, they were regular part-time employees who worked consistently over an extensive time period. Here, the parties entered into a preelection stipulation that provides that: ''regular part-time production and maintenance employees, including warehouse employees'' are included in the bargaining unit. Under these circumstances, I find that Plonka, Iggens, and Rothwell are the employees the parties meant to be covered by this stipulation.

When parties have entered into a preelection stipulation concerning the composition of the bargaining unit, the agreement is controlling in determining employees' eligibility to vote in the election and, accordingly, I find that the Charging Party's challenge to their ballots must be overruled.

B. *The Mass Layoff and Discharge of Certain Employees*

The principal issue in these proceedings is the matter of the layoff/discharge of several employees. In a case of this nature, applicable law requires that the General Counsel meet an initial burden of presenting sufficient evidence to support an inference that the employees' union or other protected, concerted activities were a motivating factor in the employer's decision to terminate or lay off the employees. Here, the record shows that Respondent made a mass layoff (except for 3 leadpersons) of all its first-shift plating department employees, the department with the greatest number of union activists, within hours of a group delivery by 30 employees of a petition demanding promised raises and vacations. The petition was rejected by President Petersen with a comment that the petition meant nothing to him and that he would do nothing until the Board ruled on pending election challenges and objections. These objections include allegations of improper preelection conduct, discussed below, which tend to show independent violations of the Act and are indicative of antiunion animus.

Most specifically, immediately after the mass layoff, Respondent sent to each laid-off employee a letter, dated July 19, in which Petersen said he was discontinuing first-shift operations because of a ''series of very serious acts of misconduct including the drainage sabotage'' until he was sure that the ''risk of reoccurrence'' was eliminated.

One of the other acts of misconduct mentioned was certain employees invading ''my office'' and making ''demands regarding wages and vacations,'' and he added, ''None of this is acceptable.'' He also offered a reward of $250 for information identifying the persons responsible and said such persons would be discharged and referred to the police for prosecution.

Under these circumstances, Petersen's letter clearly lists the employees' demands regarding wages and vacations as one of the ''acts of misconduct'' that motivated his discontinuance of the first-shift plating. That concerted activity, principally by union employees, was protected conduct and, as Petersen's letter admits, it was a consideration in Respondent's actions and it clearly is more than sufficient to establish the General Counsel's prima facie case regarding motivation.

Finally, the record as a whole supports a conclusion that Respondent's asserted justifications for its actions are pretextual (see the following discussion), and therefore also demonstrates unlawful motivation. See *Dorothy Shamrock Coal Co*., 279 NLRB 1298 (1986).

Under these circumstances, I find that the General Counsel has met his initial burden by presenting a prima facie showing, sufficient to support an inference that the employees' union activities were a motivating factor in Respondent's decision to lay off and delay the recall of all of its employees in the day-shift plating department.

These factors establish antiunion animus on the part of the Respondent. Moreover, recognition of the timing of the layoff right after a concerted action and only a few weeks after the election, the protracted delay and irregularity in the recall process, and the pretextual defense, all combine to warrant a conclusion that the General Counsel has established a strong prima facie showing that union activity was a motivating factor in the Respondent's decision to lay off or otherwise discriminate against this group of employees. See *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (lst Cir. 1981), cert. denied 455 U.S. 989 (1982), approved in *NLRB v. Transportation Management Corp*., 462 U.S. 393 (1983).

Once the General Counsel establishes a prima facie case, the burden shifts to the Respondent to show that it would have taken the same action even in the absence of union considerations. In light of the General Counsel's strong prima facie showing, the Respondent's burden here is substantial, see *Vemco, Inc*., 304 NLRB 911 (1991). Accordingly, the testimony will be discussed and the record evaluated to consider Respondent's defense and, in the light thereof, whether the General Counsel has carried his overall burden.[6]

Respondent's defense is based on its contention that it had a legitimate reason for its actions because of the egregious acts of sabotage committed by employees. It also defends its method of selecting employees for recall.

Here, I find that Respondent's actions after its initial response to the potential emergency-type situation created by the apparently repeated acid drainage into basement storage

[6] The Respondent also contends that no animus was specifically tied into the subsequent discharges of Proffitt and Mills (the suspects alleged to be responsible for the sabotage); however, Mills and Proffitt were two of the three principal spokesmen who presented the employees' petition to management and, in any event, in circumstances involving a mass or group termination, there is no need that each individual be identified specifically as a known union activist for the General Counsel to substantiate his already strong showing that Respondent's overall action was discriminatorily motivated and that this discrimination affected everyone in the group. See the Board's discussion in the *Vemco* case, supra.

tanks, and the reasons therefor, are generally implausible, inherently improbable, and uncorroborated by supportive evidence, and therefore clearly support an inference that they are pretextual.

First, the emergency clearly was over by the next day. The only preventative or investigative action taken by management was to bar all the day-shift employees' (except leadmen) from returning. No public safety authorities were contacted by Respondent despite the alleged seriousness of the event. No police or investigative health or safety agency or private investigative service was notified or asked to find the specific cause of the drainage or to recommend corrective action. Three days after being locked out, the employees began informational picketing. Three days later President Petersen sent these employees a letter saying that ''due to current production levels in the Plating department'' he was ''unable'' to bring back the entire work force and would fill only production required positions and then with the most qualified individuals.

In fact, production remained essentially the same (except for one production item plated on one particular machine). But, rather than bring back any of the first shift, Respondent immediately, and from July 19 forward, utilized the three leadpersons *and* the second-shift plating department employees on modified hours, while requiring these employees to work as much as 4 hours overtime per day. Then, when employees were selectively recalled, they were not recalled based on what machine they had been operating prior to the lockout, but returned under a new recall policy which purported to include ''qualifications,'' ''attitude,'' and ''seniority if other factors are equal.''

In fact, there is no showing that production demands or requirements underwent any substantive change on or after July 19. Except for possibly one machine, there was no change in Respondent's basically stable plating production and Respondent's allusions to production demands as a reason to prolong the layoffs clearly is nothing more than an attempt at misdirection. This was not a legitimate reason and Respondent's attempt to portray it as such is pretextual and indicative that it is attempting to mask its true motivation.

When recalls began, Hispanic and Caucasian employees generally were recalled prior to black employees (who generally were identifiable as union supporters), despite the fact that they generally had more overall experience on a broad range of plating machines, more seniority, and had often helped train the newer employees who were recalled in their stead.

Other than being physically and verbally denied their admittance to work on July 19, these employees received no written layoff notice, but were sent a letter dated July 19, saying the Company was discontinuing first-shift operations because of ''the drainage sabotage'' until it was sure that the ''risk of reoccurrence'' was eliminated. This letter also offered a reward of $250 for information identifying the persons responsible and said such persons would be discharged and referred to the police for prosecution.

Employee David Roark responded to Respondent's request for information (admittedly in hopes of getting his job back), and gave an affidavit to the Company on July 22 in which he said he saw Proffitt coming away from his workstation, at 9:30 a.m. on July 18 and going by the area of the muriatic acid drain valve and saw Mills then join him at Proffitt's workstation for a conversation.

Daniel Roark, David's cousin, gave an affidavit on July 29 that said Mills confronted his cousin David at the union hall after they had been sent home on July 18 and that after David said the drainage was dangerous, Mills got mad and that later Proffitt and Mills were joking about now getting their vacations.

In contrast to Daniel's statements, however, David said nothing about Mill's getting mad either in his affidavit or in his testimony.

Mills and Proffitt were called in and questioned, but each denied any involvement. Despite its statement in its letter to employees, Respondent did not refer the matter to the police. It did, however, suspend both ''suspects'' on July 27, and it then seized on the speculative circumstances noted by the Roark cousins and thereafter sent letters of termination to both Mills and Proffitt, two of the three most vocal spokesmen who had presented wage and vacation demands to Petersen on July 18.

Under these circumstances, I conclude that the Respondent has failed to show that it conducted any meaningful investigation or had any valid basis other than rank speculation (Roark's circumstantial placing of Mills and Proffitt away from their workstations is at 9:30 a.m., when it appeared the acid drainage occurred later, after the Union's presentation of the petition to management, when 30 or so employees were away from their workstations) that would warrant the discharge of both Mills and Proffitt, and I further conclude that Respondent's specific discharge of these 2 employees is shown to have been motivated by their union activities and to be in violation of Section 8(a)(1) and (3) of the Act, as alleged.

While Respondent was in the process of terminating Mills and Proffitt, it recalled both David and Daniel Roark on July 29, shortly after they gave affidavits. Respondent told David that he would be recalled after they got a part for ''his'' machine, and he was then brought back to operate the same machine he had been operating (he subsequently transferred to another department at a slight increase in pay).

No evidence was presented to indicate that Respondent installed locks on valves or took any other security measures (other than failing to recall many employees) that would protect the acid tanks from unauthorized drainage and therefore eliminate the ''risk of reoccurrence'' that it was said to be so concerned about.

In addition to the three leadpersons, those from the second shift, and the recall of the Roark cousins, Respondent also recalled Henry Burrows, Ronald Erdman, Chris Johnson, and Eric Kamauga on July 29. Vincinte Lepe, Francisco Sigala, and Maria-Carmen Olea were all recalled on August 1 or 3 even though the latter three, and Johnson, had the least amount of seniority and experience, having each been an employee only since mid-May, a little over 2 months (Kamauga, an inspector, and Burrows were black employees). On July 18 there had been 23 day shift plating department employees including the 3 leadpersons. As of August 26 only 9 of 20 had been recalled.

Black employee Jasper Hicks, who had worn union buttons during the campaign and was a member of the organizing committee, was among those laid off. Hicks left work with his supervisor's permission immediately after the peti-

tion was presented and was not there when the acid drainage occurred nor was he there to be sent home with its other employees. Despite his absence when the ''sabotage'' occurred, he was denied admission the next day and was not recalled until December 3, after he successfully passed a drug screening.

Under all these circumstances, and especially in view of Respondent's consistent production requirement, its scheme to cover these needs with changed hours for second-shift employees,[7] the use of leadpersons, limited recall, and extensive overtime, and its inconsistent recall procedures that appeared to often disregard experience and otherwise often appeared to omit blacks who were union sympathizers, I conclude that the Respondent has failed to show that its lockout of an entire shift of workers and its subsequent delayed and selective recall of employees were dictated by legitimate business reasons. I further find that the various proffered reasons for its extreme reactions to the act of sabotage are pretextual and do not rebut the General Counsel's showing that its actions were motivated by the employees' union activities, especially the presentation of a petition demand for promised wage increases and vacation which occurred just prior to the layoff. Here, Respondent seized on a seemingly legitimate excuse to purge the plant of the most significant body of union supporters and, accordingly, I find that the Respondent's mass layoff and prolonged or delayed failure to promptly recall these employees is shown to have violated Section 8(a)(1) and (3) of the Act as alleged.

This conclusion is reinforced by Respondent's related and contemporaneous discriminating treatment of employees Mills and Proffitt, discussed above, as well as its similar actions in requiring a drug test before recall and its discharge of union activist Lisa Nixon when she allegedly failed that test after finally being recalled in late October.

Nixon, like Mills and Proffitt, was black, a long-term employee, a member of the Union's organizing committee, a principal spokesman at the presentation of the wage and vacation demand petition just prior to the mass layoff, and one who engaged in subsequent picketing of Respondent's facility. On November 7, about a week after being recalled and tested, she telephoned the Company and was told by Petersen that her drug test showed positive and that she could not work at ABQC. Nixon told Petersen that positive results were ''impossible'' and that she was not a drug user. She asked Petersen to provide her with a written copy of the drug test results, having previously been told at the doctor's office she could get a copy from the Employer. Petersen said he did not have a copy. Nixon asked what kind of drugs were alleged and Petersen said he did not know but later that day was told the drug was cocaine. Nixon again protested that she was not a drug user but, despite her request, she was never provided a copy.

Respondent acknowledges that Nixon was terminated effective November 7. Her ''assignment'' form, from Respondent's personnel records, is checked as ''project completed'' rather than showing her ''terminated'' or with any other reason, and it otherwise is marked affirmatively as ''Eligible for Rehire.'' A copy of her drug test was not in her file and a copy offered into evidence as Respondent's Exhibit 12 was objected to by the General Counsel following Petersen's testimony regarding a phone conversation in which he said the doctor told him the test was positive for cocaine. I affirm my ruling that this testimony is admissible (it is not hearsay but is a verbal action which is the asserted informational basis for Petersen's further actions in affecting Nixon's termination, and it is not for the truth of test result). I also accept the General Counsel's request to withdraw his objection and his related motion to receive Respondent's Exhibit 12, and it is received into evidence.

No explanation was given as to why the test report was not given to Nixon or why it was not in her file. The test, however, on its face states that the reason was for ''pre-employment'' and that the collection date was ''November 18.'' The results (positive, cocaine) were dated ''November 27.''

Here, the physical test report is inconsistent with the date of the actual ''collection'' and cast into doubt the validity of Petersen's phone receipt of the test results on or about November 7 and lend credence to Nixon's consistent denial of drug involvement. Respondent's entries on her personnel records also are inconsistent and, in the light of the overall strong showing of motivation against Nixon and others because of union activities, support an inference that Respondent has relied on pretextual reasons in its apparent desire to avoid recalling a strong union supporter. Moreover, I find that Respondent's assertion that Nixon was denied recall under its drug policy also is pretextual.

The Company's asserted drug policy states:

> The company reserves the right to request an Alcohol/Drug screening prior to employment or after being laid off for a substantial period of time.

Although there was testimony adduced that indicates that the Respondent did not consistently strictly embrace this policy,[8] the record here shows that Nixon would not have been laid off for a ''substantial'' period were it not for the Respondent's intervening illegal acts in first laying off the entire first-shift plating and then failing to timely recall employees from layoff for discriminatory reasons. In this connection it is noted that Nixon, in particular, was shown to have been an experienced, cross-trained employee capable of operating almost all the department's machines. Otherwise Respondent has shown no persuasive or valid reason she was not recalled until late October or why less experienced, less senior employees were recalled ahead of her in July and August (when no additional drug test was given). Inasmuch as the Respondent's use of an additional drug test is not based on a valid layoff for a substantial period, it cannot be the basis of a valid reason for termination. Therefore, for both of the reasons discussed above, I conclude that Nixon's termination is not shown to be founded on valid business reasons but was motivated and caused by her and the other employees' involvement in union activities, and I find that Nixon's termination is shown to have violated Section 8(a)(1) and (3) of the Act in this respect, as alleged.

[7] I find that Supervisor Stanosz' testimony that no changes occurred is not creditable and is contrary to the weight of the evidence.

[8] For example, several of the Hispanic employees who were hired in May, just prior to the establishment of the voter eligibility list, began work prior to the results being received while most previous job applicants had to wait for the results before starting.

C. *Alleged Preelection Violations of Section 8(a)(1)*

On April 19, the day after Respondent declined to recognize the Union, Petersen met with all employees and announced that, for an indefinite period, they were being transferred to Staff Right's payroll (instead of ABQC's payroll), due to ''cash flow'' problems. Petersen testified he was not sure of the date he met with the employees regarding this payroll transfer matter and guessed ''between April 7 and 12,'' or somewhere in that area. Several employees testifying estimated the date as being approximately 1 week after April 12, or specifically on or about April 19, and I credit that specific testimony (a letter from Staff Right to Respondent, agreeing to the proposal is undated). The announcement made employees very upset, very scared because they felt that they were now ''temporary'' employees of Staff Right again instead of having the ''permanent'' status attained with ABQC. As ''temporary'' employees, a status most had previously held with Staff Right when first hired, they felt they no longer possessed job security or protection and, as temporary employees, they felt they could not get car or other loans with paychecks from a temporary service.

Despite the fact that Respondent contemporaneously executed the purchase of another company, it presented evidence that it did have a cash flow problem that was alleviated by its temporary use of Staff Right's payroll services. This issue, however, does not depend on a motivation—business reasons—criteria for its resolution.

The question is whether this action (i.e., a taking away of permanent employee tenure status and reversion to status as only a temporary employee) had a reasonable tendency to be viewed as a reduction in benefits or a scare tactic that has an influence and effect on employees that interferes with their rights under Section 7 of the Act. Here, Respondent's action was taken contemporaneously with its rejection of the Union's recognition demands and it was not accompanied by any verbal or written assurances that the employees' tenure or status as permanent employees would not be affected by the action. Otherwise, Respondent made no effort to repudiate the unlawful impression that was conveyed to the employees. Accordingly, I find that the announcement and action in this regard interfered with the employees' Section 7 rights and violated Section 8(a)(1) of the Act, as alleged.

Shortly after the payroll change announcement, Supervisor Keith Stanosz had a conversation with several warehouse employees in their work area. Robert Nixon, Calvin Jones, and Timothy Mays confirmed that in the conversation, Mays asked Stanosz why were the ABQC employees switched to the Staff Right payroll, and Stanosz answered that ''they was trying to scare us off of the Union'' or that it was ''just to scare us.'' He also said that ''as a matter of fact we don't need no Union'' and then asked who was behind or who was trying to form the Union. When asked by Respondent's counsel if he recalled any of this conversation, ''where you discussed the reason for transfer of the employees to Staff Right?'' Stanosz replied: ''I had so many people ask me questions about it, I don't remember specific things.'' He then was asked: ''Do you recall whether or not you ever told them that the purpose was to scare off the union?.'' He answered, ''No, I never told anybody.'' Inasmuch as Stanosz had no recall of the conversation, I find the corroborative testimony of the three employees to be more convincing than the bare denial Stanosz made in response to Respondent's leading question, and I credit their testimony in this respect.

These remarks by Stanosz, at the start of the union campaign, were made under a totality of circumstances that underscores the threat implied in the employees' perceived demotion in status from regular to temporary employees, and the accompanying interrogation has the necessary indicia to show coercion. Accordingly, I find that Supervisor Stanosz' remarks are shown to have violated Section 8(a)(1) of the Act in each of these respects, as alleged. Compare *Sunnyvale Medical Clinic*, 277 NLRB 1217 (1985).

In late April Mills, Proffitt, and Nixon spoke for a group of 20 or more employees where they presented a letter to Petersen asking for recognition and demanding a meeting to discuss what was happening. Petersen responded that the petition meant nothing to him and that he didn't recognize the Union. Respondent thereafter executed an admitted ''game plan'' to resist the Union's organizing attempt, which plan included the hiring of labor counsel, letters mailed directly to employees, and speeches to employees once and sometimes twice weekly.

After one speech (between May 13 and 27), Stanosz spoke to Sonny Anderson in a manner suggesting interrogation, a matter not alleged in the complaint. The General Counsel asked that it be embraced within his motion to conform the pleadings to the record; however, I find that any consideration of this suggested interrogation would be needlessly duplicative and cumulative and, therefore, I find it unnecessary to rule on this matter as an alleged violation of Section 8(a)(1).

Former employee Dale Wiegert testified regarding several conversations with Staff Right Owner James Lazear alleging that he made several remarks alluding to anti-''Union'' type remarks attributable to its employee hiring relationship with the ABQC. Lazear's testimony contradicted Wiegert. Wiegert went out of his way to tell Respondent he had voted ''against'' the Union, and he quit shortly after the election. Otherwise, he gave inconsistent and highly improbable testimony. Lazear's testimony and my evaluation of Wiegert's overall testimony and demeanor tend to show a degree of instability and unreliability on Wiegert's part that shows his testimony to be unreliable and unpersuasive. Accordingly, I cannot find that anything he said is entitled to any persuasive weight and, therefore, it does not support any allegations of unfair labor practices.

Terrance Schuster was a self-described ''management labor lawyer'' retained by Respondent ABQC in conjunction with the union organizational campaign. Although he generally denied having ''interrogated'' employees Robert Person and Keith Mills, the overall evidence clearly and strongly suggests otherwise. Schuster testified that he walked around on the plant floor ''four or five times'' prior to the June 21 election and said he ''may have told employees that the Union was not in his/her best interests'' and that it ''is a possibility'' that he told employees ''things will get better at the plant.'' He was involved in helping with the writing of the speeches given to employees, and he was with Petersen when employees were told management was against representation by the Union. He also admitted that he did speak to Mills and Robert Person during worktime on the shop floor. He reluctantly admitted that ''it is possible'' that it was he who had approached them and he agreed that he

talked about basketball and ''may have'' told them he used to work in a plant like the Respondent's. Robert Person testified that approximately 2 weeks prior to the June 21 election, Schuster approached him at his workstation and:

> A. He asked me how did I feel about the union. And I told him I feel that we needed one because the company said one thing and do another thing. And he told me that would get better, and he walked away.
>
> Q. Do you recall him saying anything else?
>
> A. No, he say he used to work in a place like this and things would get better, and he walked away.

Mills testified that in early June, Schuster also approached him in the plating department asking if he still felt the same way about the Union? Mills replied he still supported the Union and was not going to change his mind. Schuster then allegedly replied that if there was a union at ABQC, ''your wages will go down'' and began talking to Mills about basketball. The latter statement was not alleged as a violation in the complaint, and I find it unnecessary to rule whether this is a violation of the Act for the reasons previously noted above.

Person was not known at that early time as an open and active union supporter, and I find that the totality of the circumstances regarding his interrogation are coercive and are shown to have interfered with his Section 7 rights in violation of Section 8(a)(1) of the Act, as alleged, see *Sunnyvale Medical*, supra. Mills, however, was an open and active supporter and, as I find it improbable that Schuster actually made any additional comment about wages going down, I am not persuaded that the circumstances surrounding the question to Mills support a conclusion that Respondent violated the Act.

A number of other alleged preelection acts of interrogation also were alleged to have been made by President Petersen and Supervisors Stanosz and Sheryl Valente. Jeffrey Heppe, a former employee, testified that he and several other warehouse employees were approached by Warehouse Supervisor Valente, on about June 19, in Glearon Scott's work area, and that Valente ''asked us if we were voting yes for the Union.'' He further testified Valente stated that ''if the Union got in that she would have to rework our jobs, that we'd have no more free time and she'd have to write us up for every little thing.'' Additionally, ''she said she would have to add extra job duties . . . to make up for our free time that we had,'' and that if the Union got in they would have to stay at their workstations during worktime. Heppe also testified that she frequently asked him what he was going to do (about the Union). Employees Scott and Steve Grady each testified in a similar fashion and confirmed the thrust of the conversations. Valente testified that she had followed the instructions from the company attorney that she could not ask employees how they felt about the Union. She said Scott called her over and asked her why she didn't like the Union. She told him and continued an exchange with other employees as they came back from a break and joined in the conversation.

Valente's testimony minimizes the nature of her part in the conversation, and Respondent contends that it was a ''casual'' expectable conversation between a supervisor and employees who work closely together and therefore acceptable as similar to that involved in *Sunnyvale*, supra. Here, however, I find credible testimony that Valente's retorts went beyond casual remarks and on several occasions alluded to the imposition of more restrictive working conditions if the Union was selected. Moreover, Valente engaged not only in this one conversation but had repeatedly made earlier inquiries regarding the Union. Accordingly, in the context of her continuous and repetitious pursuit of the subject and the implicitly threatening nature of her responses about more restrictive working conditions, I find that the totality of the circumstances were coercive, and I conclude that the conversation interfered with its employee rights and violated Section 8(a)(1) of the Act with respect to both her interrogation and threats, as alleged.

Employee Jasper Hicks, who admittedly wore a union button, testified that during the first week in June, Respondent's president spoke to him at his workstation and that:

> A. We . . . were just talking about the union and [Petersen] asked me what I think about it and how I felt about it . . . so I told him that . . . it would help us get more money and better benefits . . . and . . . he said that they felt they were treating the employees fairly, so he really didn't think that we needed the union in there.
>
> Q. Okay. And did he raise the subject of the union in this conversation.
>
> A. Yes.

This action by Respondent was not part of the allegations in the complaint in this case, and I will deny the General Counsel's motion to amend to cover this situation inasmuch as it involves a cumulative allegation. I note, however, that the interrogation took place at Hicks' workstation and was made by the company president, a circumstance that tends to show coercion and, otherwise, it shows that the Respondent, at the highest level of management, was willing to walk and cross the edge of the line between casual and coercive conversation in order to attempt to influence the forthcoming election. The fact that the company president and legal counsel engaged in such behavior makes it that much more plausible that Supervisors Valente and Stanosz bluntly questioned employees about why they wanted a union.

Mills testified that about a week or so before the June 21 election, Supervisor Stanosz approached him in the ''roto finish'' work area, saying:

> ''What do you want a fucking union in here for anyway? It's not going to help you at all.'' And I said, ''Well, it is going to help me, you know, help me, you know, get me a raise and stuff like that.'' And then he said, ''You're lying, Chuck. You're a liar, Chuck,'' or something of that matter, and then he turned around and started walking away.

Employee Virginia Boyde testified that while working on first shift in the plating department a week or two prior to the June 21 election, she developed painful cramps and went outside for fresh air, helped by fellow employee Lisa Nixon, Stanosz approached them and, after ascertaining what the problem was, asked if he could ask them a question. Nixon testified, ''that he asked were we for the [U]nion and what we [thought] about the [U]nion.'' When they answered, he

said, ''why?'' They answered: ''for respect . . . because of the favoritism that was going on, because we did not have job security, because of pay, wages . . . no good health insurance . . . because the company was not fair.''

Matthew Emer signed and was involved in the late March-early April circulation of the petition of union interest. He saw Stanosz with the petition in his possession and in a position to see the names thereon. He signed a union card on April 12, he attended union meetings, and he signed at least one distributed union handbill.

On about June 18, Emer, who was a machine maintenance mechanic under the supervision of a supervisor other than Stanosz, received a warning for his attendance. Emer testified that on the same day, as he was leaving the plating department, Stanosz stopped him and ''asked me if I realized how strict the attendance policy would be if we got a union in there, that [ABQC would] go to the letter.'' Stanosz was not asked about this conversation when he was called as Respondent's witness. Emer, however, was questioned on this point on cross-examination by the Respondent and the General Counsel ask that it be embraced in his motion to amend the pleadings and found to be a violation of the Act.

Stanosz admits that he questioned the two women but only to the extent that he asked them if they thought ''he'' was unfair to workers as alleged against the Company in a union leaflet that had been circulated earlier that day, and Respondent urges that it was just a casual conversation; however, I find that Stanosz went beyond the bound of casual conversation, and I conclude that the timing of the interrogation of two members of the union committee shortly after the Union had distributed a leaflet on the subject of his questions had an inherent coercive effect that would tend to interfere with their expression of similar positions, and I find it violated Section 8(a)(1) of the Act as alleged.

With respect to Stanosz' attendance remarks to Emer (which stand unrebutted), I find that they were coercive and threatening in that they were made by the supervisor of another department (where Emer went to work on machines), who had apparent knowledge that Emer's own supervisor had disciplined him for attendance and were made only 2 or 3 days prior to the election and on the same day that he had received the warning. Accordingly, I find that this threat of a more severe working condition if the Union was selected violates Section 8(a)(1) of the Act, and I accept the General Counsel's motion to amend the complaint in this regard.

The General Counsel asked that a statement by Supervisor Valente also be considered a threat. The alleged remark (not alleged in the complaint) was to the effect that the Company ''could'' (not would) drag its feet on contract negotiations and was in response to a question from an employee. Under these circumstances, I am not persuaded that it would constitute a violation of the Act, and I find it unnecessary to consider it as part of the complaint.

Finally, on June 17, just 4 days before the election, Petersen told employees that there wasn't a cash flow problem any more, but that because of the ''[NLRB] election, everything was tied up . . . that they couldn't give out any raises (or vacations), now because the election was pending . . . and that they would get the raises and paid vacations 'down the road.''' Prior to July, Respondent did not grant raises, merit wage reviews, or paid vacations to any bargaining unit employee.

Witnesses for the General Counsel consistently testified that when they were hired they were told that they would get or be eligible for raises and vacations after 1 year, a generalized fact not disputed by Respondent. Respondent argues that it is the question of whether there was a promise or a guarantee that is at issue, and that was Petersen's constant position that neither he nor his predecessor ever ''promised'' employees 1 week of paid vacation after a year, but that they indicated it was ''likely'' that there would be raises and vacations tied into 1 year of service.

It is well settled that an employer in the midst of a union organizing campaign is required to proceed as it would have done had an organizing campaign not been in progress. See *Russell Stover Candies*, 221 NLRB 441 (1975), and *Gates Rubber Co.*, 182 NLRB 95 (1970). Here, Respondent is shown to have told new employees that they would get or be eligible for raises and vacations after a year's service. Not only did it fail to attempt to implement its asserted policy when requested to do so by the employees, but it affirmatively put the granting of these expected benefits on indefinite hold specifically because employees were seeking union representation. I find that this delay is unreasonable, and that it constitutes an action that interfered with employee Section 7 rights to freely choose a bargaining representative. Accordingly, I find that its conduct in asserting an indefinite delay in implementing its plan violated Section 8(a)(1) of the Act, as alleged. See the *Russell Stover* case, supra.

D. *Objections*

In view of the above findings of violations, I also find that to the extent they parallel the Union's objections such objections are sustained. Those objections not otherwise discussed and sustained below are considered not to have been proven and are overruled.

Objection 10—This objection alleges that the Company failed to timely post the election notice and is based on employee Mills' testimony that he didn't see one in the plating department until the day before the election. Ruth Zinns credibly testified that she posted three of the notices, including one in plating, about 1 week before the election and that she read and followed the instructions from the Board as to the posting requirements. When one notice became defaced in the cafeteria about 2 days before the election, she took it down and probably replaced it.

The record has no corroborative support for Mill's apparent failure to observe the notice in the plating department until the day before the election and as there is no claim that anyone failed to get notice of the election or that anyone else observed anything that would contradict Zinns' recollection, I find that the objection should be overruled.

Objections 14 and 17—These objections relate to alleged antiunion statements by Staff Right's half owner, Jim Lazear, particularly to Dale Wiegert prior to his employment. Lazear testified that he had never received any instructions to screen applicants for their union beliefs either before or after the organizational campaign had begun but that once the campaign began, he informed applicants that there was such a campaign in progress and what it entailed in order that they would make an informed decision as to whether they wanted to be employed.

Lazear also denied any further discussion with Wiegert or others about the Union. As noted above, Wiegert's demeanor

and overall testimony was not reliable or persuasive. I credit Lazear's testimony and I therefore find that there is no credible or persuasive support for these objections and they are overruled. To the extent that the General Counsel's motion to amend the complaint to include these events as alleged violations, I further find that the record contains insufficient probative evidence to substantiate his claim.

Objections 16 and 18—These objections contend that the *Excelsior* list was incorrect and was intentionally ''stacked'' by Respondent to include supervisors, etc., and by its sudden hiring of eight employees immediately prior to the May 11 cutoff date. The Respondent did attempt to include employees Habel, Zinns, Strupinsky, and Nimtz in the unit, despite their lack of a community of interest, as found above.

Francisco Sigala credibly testified that he, Maria Olea, and Vincinte Lepe all completed their employment applications and took the urine tests at Staff Right on Friday (May 10). Wiegert said he applied May 9 or 10, and Respondent's records show that he started on May 10, Lepe also on May 10, and Francisco Sigala and Olea on May 11, a Saturday; however, Sigala testified that he did not start work until Monday, May 13, 2 days after the May 11 cutoff date for eligibility. Chris Johnson also was hired on May 10 (as were two others who did not stay and were not on the *Excelsior* list), and all were hired for the plating department. Respondent's records show that 12 of 19 hired for that department prior to May 10 had started on Monday (or a Tuesday after a holiday), 3 had started on a Friday, and none on a Saturday. Moreover, several employees testified that they had not been allowed to start until they had taken and received the drug test results. The several Hispanic employees testified that they were given the drug test at the office at Staff Right right after they applied. Francisco Sigala said he took the test on Friday, but didn't start until the next Monday (May 13). Cruz said he started May 10, the same day he applied, and that he took the drug test 4 hours before starting (on the second shift) but wasn't told it was okay until his second day.

The Charging Party also made an offer of proof that two of the employees hired on May 10 or 11 (Chris Johnson and Mike Cintron), neither of whom was called to testify, told Mills that when they were hired by Staff Right they had to say they were against the Union. The Charging Party asks that I reconsider my ruling rejecting this proffered testimony; however, I find it to be unreliable hearsay and I affirm my prior ruling.

I find that the circumstances surrounding the objections indicate a high probability that both the naming of ineligible employees to the *Excelsior* list and the precipitous hiring of several employees thought likely to be against the Union (other testimony indicated a supposition that the Hispanic employees were less likely to favor the Union in this company setting) had the effect of interfering with the fairness of the election. Although Foreman Stanosz made some oblique references to overtime and inventory and a need to create sales and to run more machines at the general period of time prior to the election on June 21 and of his talking to Petersen about one solution was to hire more people, there was no showing of any specific probative business reason that eight persons were hired on May 10 and 11 and why they were hired in a manner inconsistent with general past practices. Under these circumstances, I find that the objections should be sustained.

Objection 21—A day or two before the election, Mills posted a leaflet which read, ''Things work best when you vote Union yes.'' President Petersen came up to Mills at his workstation and told him to take it down even though employee Jacinto Torres had a sign with the middle finger sticking up which said, ''Vote No!'' Torres' sign, obviously antiunion literature, had been posted for 2 weeks, and I find that Petersen's conduct was discriminatory and sustain the objection.

E. *Alleged Postelection Violations*

As noted, several of the earliest hired employees testified how they had been told that they could expect wage increases. Petersen himself testified:

> I said, you know, after a year rolls by, I am sure that we would have a benefit package in the form of vacations and some sort of wage increase. And I said as the company grew, that they would grow with us. That is what I told them, I believe it was September or October of 1990. And I never made no promises to them at that point. That is exactly what I told them.

Then, during Petersen's meeting with employees on June 17, he told employees there wasn't a cash flow problem any more, but that because of the election, ''everything was tied up . . . that they couldn't give out any raises now because the election was pending . . . and employees that they would get the raises and paid vacations'' ''down the road.'' Accordingly, and for the reasons discussed above regarding Respondent's preelection threats to withhold these same benefits because of the pending election, Respondent's actions after the election, while objections to the election were in litigation, also constitute a violation of Section 8(a)(1) of the Act, as alleged. See the *Russell Stover* case, supra.

Next, Petersen sent a letter, dated July 27, to all employees stating:

> The company at this time has decided to grant all eligible employees with 1 year's seniority the following:
>
> A. 1 week's (5 days') vacation with pay.
>
> B. Merit wage review.

Respondent stipulates that any and all changes made with respect to the employees' wages, hours, and working conditions from April 18 to date were made unilaterally and without prior notice to, or bargaining with, the Union. The General Counsel argues that the benefits were granted in order to dissuade union support and activity and that in view of the timing of this action it also violates Section 8(a)(3) of the Act (on this same date Respondent suspended leading union activists Mills and Proffitt and shortly thereafter recalled six less senior and less experienced employees who were not members of the organizing committee).

Although at first glance it may seem inapposite to conclude that Respondent could violate the Act first by failing to grant wage and vacation benefits and then again violate the Act by granting these same benefits, the two clearly are related and each reinforces the other. Except for the passage of several weeks, there is no intervening event to explain Respondent's change in policy (the election objections still pending before the Board), except for Respondent's interven-

ing purge of many of the Union's strongest supporters in the mass layoff of the day shift plating department.

As cited by the General Counsel, the Court in *NLRB v. Exchange Parts Co*., 375 U.S. 405, 409 (1964), stated:

> The danger inherent in well-timed increases in benefits is the suggestion of a fist inside the velvet glove. Employees are not likely to miss the inference that the source of benefits now conferred is also the source from which future benefits must flow and which may dry up if it is not obliged.

Here, the sudden granting of benefits after they first were withheld, assertedly because of pending Board matters, under circumstances where the Company had just made a mass layoff of an entire department shift with strong union backing and had also suspended two of the leading union spokesmen, sends a clear message that the Company controls the source of benefits and that employees who try to influence its action through union activities will have difficulties in keeping their jobs. This message clearly interferes with employee Section 7 rights, and Respondent's actions in both of these respects violate Section 8(a)(1) of the Act, as alleged.

As noted above, the Respondent stipulated that all changes made in wages and working conditions after April 18 were unilaterally made without notice to, or bargaining with, the Union. Most of the unilateral changes can be found in Respondent's first-ever employee handbook which issued in early September and which reflects changes[9] made then and since April 18. The changes under the wage structure, for example, show a per hour change for a warehouse material handler from base—$6.25, top—$7.60, to base—$6.40, midrange—$6.70, and top—$8.

Under all the circumstances, and in view of the Union's majority status, as further discussed below, I find that the Respondent has violated Section 8(a)(5) and (1) by making these unilateral changes, and I further find that these changes also effectively discouraged and undermined the employees' support of the Union in violation of Section 8(a)(3) and (1) of the Act, as alleged.

[9] These changes were:

1. New ''Sexual Harassment'' policy subjecting employees to immediate discharge.
2. ''Hours of Work'': changed first- and second-shift hours, a change in second shift from 3 p.m.—11 to 9 p.m.—7 a.m.
3. ''Job Descriptions'': never existed before.
4. ''Layoff and Recall After Layoff'': never existed before. Uses ''attitude'' as element in determining layoffs and recalls.
5. ''Call-In Pay; Report Pay; and Outside Employment'' policies: never existed before.
6. ''Solicitations and Distribution'': never existed before.
7. ''Paid Time Off'': never existed before. Note first reference to 1 week of paid vacation after 1 year. The additional weeks and days of paid vacation were all given after the July 27 1 week of paid vacation.
8. ''Holidays'': added four additional yearly holidays.
9. ''Seniority'': never had a formalized seniority system before, including no prior reasons as basis for losing seniority.
10. ''Discipline'': never had formal progressive disciplinary system before.
11. ''Alcohol and Drugs'': new; including the broadened right of Respondent to require ''blood or other tests to determine compliance with [its] alcohol and drug policy.''
12. ''Wage Structure.''

F. *Sonny Anderson's Discharge*

Sonny Anderson was an articulate supporter of the Union; however, he was not a recognized leader or a significant spokesman for the employees to the same degree as were Mills, Proffitt, and Nixon. He was considered to be a good worker on the first-shift plating; however, he was not recalled until December 5 after the July layoff. He received a 36-cent-an-hour raise in February 1992 but learned another employed doing the same work had been given a 51-cent-an-hour raise. Anderson canvassed other black and nonblack first-shift plating department employees concerning the amounts of their raises and formed the opinion that the raises of the black employees were uniformly lower than those of the nonblack employees.

Anderson went to Stanosz' office and testified that:

> I told him that I didn't feel it was fair, I got treated fairly on the raise he gave me, and that it seemed in general that the black employees were given less in raises than anyone else of non black employees. Keith just told me, no comment. That's the way it is.

Anderson then went to President Adikes' office (Stanosz also was present) and testified that:

> I told Bob Adikes that I felt that I was being treated unfairly with the raise that I got, and that—I told him it seems like black employees were treated unfairly when it came to raises and different positions such as lead persons. And then Bob Adikes said that other peoples' business isn't my business and that he only wanted to hear my business. And so I told him that I can't help it to help other employees, because it was down in me to do that, especially my brothers and sisters. I said because they are flesh in my flesh, and bone in my bone. Their hurt is my hurt. Because when the same conditions situation at ABQC.

In April, Stanosz stopped to question Anderson as to why his machine was running empty. Anderson responded by asking why he was questioned and a white employee was not; Anderson testified that:

> Keith said what are you talking about. And then I told him that what was the difference between me and Robert and Chris. And then he said, I told him by him acting this way, treating people different because of their race that he was acting like the devil. And he walked over to me real fast.

Stanosz then told Anderson, ''young man, you don't call me a devil.'' Anderson then told Stanosz that if he would stop acting like a devil, he would not call him one. At the end of the shift, Stanosz told Anderson Adikes wanted to see him. All three met and Adikes asked Anderson to explain what had occurred and Anderson said he called Stanosz a devil ''because he is treating the [B]lack employees differently,'' ''acting like a devil toward us [B]lack employees.'' Stanosz warned Anderson that he would fire him for insubordination if he called Stanosz a devil again and Anderson said he would not do it again.

In mid-May, Anderson canvassed all the black employees and women in the first-shift plating after a white employee

who worked in the first-shift plating department was given a better-paying job. Anderson went to Stanosz, explained he had talked to all the other black and female employees discovering they did not ever know the job was available, and that he did not think it was fair to the black and female employees. Anderson also complained to Adikes, who said he thought the position had been posted.

On July 20, Stanosz changed Anderson's machine assignment because the machine was down, and assigned him to the phosphate machine. Shortly thereafter Stanosz observed Supervisor Habel remonstrating face to face with Anderson for not having timely relieved the operator on the phosphate machine. Stanosz then took over the conversation and told Anderson that he knew what job he was to do and that the operator needed relief. Anderson also told Stanosz that he thought it was unfair for Stanosz to ''move us employees around.'' Stanosz told Anderson that he could leave ''if he didn't like it,'' Anderson did just that. As he was leaving, Stanosz told him he should think about it, but Anderson left at about 7:15 a.m.

Shortly after 9 a.m., Anderson called President Adikes, asking if he had been made aware of the incident. Adikes said he had heard about some of it but had not had a chance to investigate as yet. Anderson then explained that ''because of Keith moving us around, us employees that it upset me.''

The next morning, after receiving approval from Adikes, Stanosz discharged Anderson, telling him he couldn't get in anybody's face and couldn't just walk off. Anderson specifically testified that:

> He said he couldn't tolerate me getting into supervisors' faces when I would go off on them. And then he also said that if I wouldn't had gotten into Al Habel's face, he wouldn't have fired me.

Here, I agree with Respondent that Anderson's union activities had nothing to do with his discharge. However, although it also appears much of his protesting was directed at his personal situation, I also find that it has ''some relation to group action in the interest of employees'' and therefore it was protected concerted activity. See *Circle K Corp*., 305 NLRB 932 (1991).

Anderson's discharge, however, did not follow directly from his protest to management but was occasioned by his subsequent confrontation with a supervisor. Accordingly, an analysis is required under *Wright Line*, supra, to see if Respondent's evidence shows that Anderson would have been discharged in the absence of his protected concerted activity.

Here, I find that there is no timeliness or valid nexus between Anderson's earlier complaints to management and his statement to Stanosz that ''it was unfair of him to move us employees around'' at the time Stanosz spoke to him after seeing his face-to-face remonstration with Supervisor Habel about his apparent failure to promptly report to his new assignment. Anderson himself testified that Stanosz said:

> Even though I had bad attendance record, he still would have kept me as an employee, but he couldn't tolerate me getting into a supervisor's face. And that's the truth.

Under these circumstances, I am persuaded that Anderson's July discharge rested solely on his imprudent and insubordinate conduct. This behavior conflicts with an employer's right to otherwise maintain order and respect in the workplace. I am not persuaded that the showing that Stanosz himself had a face-to-face argument with employee Person in March 1991 (without imposing discipline) is a pertinent or controlling showing of disparate treatment, and I conclude that the Respondent has shown that it had a legitimate, nonpretextual reason for Anderson's discharge and would have taken the same action regardless of his prior concerted activity. Accordingly, I cannot find that the Respondent violated the Act in this respect, as alleged.

G. *The Bargaining Unit and Majority Status*

The complaint alleges that an appropriate unit consists of:

> All full-time and regular part-time production and maintenance employees, including warehouse employees of the Respondent, employed at America's Best Quality Coatings Corp. facility in Milwaukee, Wisconsin; but excluding all office clerical employees, professional employees, guards and supervisors as defined in the Act.

I find this to be an appropriate unit and that four persons whose ballots were successfully challenged (Habel, Nimtz, Zinns, and Strupinsky) should not be included in the unit. As of April 18, 34 of the 62 (see G.C. Exh. 6a) bargaining unit employees signed valid authorization/membership cards and, subsequently, as of June 21, the election day, it had obtained 10 additional cards, while Respondent's employees never exceeded 88 during this period. Accordingly, I find that the Union had majority status on and after April 18, 1991.

H. *Refusal to Recognize or Bargain for a Bargaining Order*

The Respondent received a letter from the Union noting majority status and demanding bargaining on April 18. The Respondent refused to recognize the Union and, as discussed above, made unilateral changes in wages, benefits, and working conditions without first bargaining with the Union and, in view of its failure to demonstrate valid majority status free of disqualifying conduct, in the election that was conducted on June 21, I find that the record shows that Respondent's conduct in this respect is in violation of Section 8(a)(3) and (5) of the Act, as alleged.

Under the holding of the Court in *NLRB v. Gissel Packing Co*., 395 U.S. 575 (1969), a bargaining order is an appropriate remedy for violations of Section 8(a)(1) of the Act, where it is shown that a union obtained signed authorization cards from a majority of the employees in an appropriate unit, and, after the union had attained majority status, the employer undermined the union majority status and made the likelihood of a fair election impossible.

In consideration of the nature and extent of Respondent's unfair labor practices discussed above, it is concluded that the General Counsel has shown that Respondent's illegal mass layoff of a major prounion department of the bargaining unit under pretextual and discriminatory circumstances, as well as other illegal acts, as found above, constitute a valid basis for the imposition of a bargaining order.

As noted in the discussion of Union Objection 18, the Respondent precipitously hired eight persons the day before or

on the May 11 cutoff date under circumstances that clearly interfered with the fairness of the election and had a probable effect in dissipating the Union's majority. The mass layoff in the day shift plating department resulted not only in discriminatory delays in recall of those who were most likely to have been union supporters, but also resulted in some other turnover in the unit that has a clear causal connection with that specific unfair labor practice. The Respondent was involved in other unfair labor practices and objectionable conduct surrounding the election which also undermined the Union's majority. These actions have a continuing effect on employees that would foreclose the possibility of a fair election should a second election be held in the near future.

In conclusion, I find that these factors demonstrate conduct which is so serious and substantial in effect that a fair election untainted by the undermining impact of Respondent's discriminatory conduct would be unlikely. No mitigating circumstances are shown that would indicate that a fair election is possible, and I conclude that it is necessary and appropriate to grant a bargaining order because, given the gravity of Respondent's misconduct, the Union's card majority provides the more reliable test of employees' desires than a contested election. Accordingly, I find that a bargaining order is shown to be justified.

Based on the ruling pertaining to challenged ballots, it is now possible that the Union may receive a majority of the votes. Regardless of this outcome however, it is necessary and appropriate to grant a bargaining order inasmuch as appellate procedures could result in delays or another conclusion and because, as noted, given the gravity of Respondent's misconduct, the Union's card majority provides the more reliable test.

Otherwise, I also conclude that it is shown that objectionable conduct by Respondent occurred between the filing of the representation petition and the date of the election, and the Board had found that violations of Section 8(a)(1) that occurred during such period are sufficient to warrant overturning an election. See *McLean Roofing Co*., 276 NLRB 830 (1985), enfd. mem. 827 F.2d 1423 (8th Cir. 1986), and cases cited there.

CONCLUSIONS OF LAW

1. Respondent is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. The unit appropriate for collective-bargaining is:

> All full-time and regular part-time production and maintenance employees, including warehouse employees of the Respondent, employed at America's Best Quality Coatings Corp. facility in Milwaukee, Wisconsin; but excluding all office clerical employees, professional employees, guards and supervisors as defined in the Act.

4. By interrogating employees concerning their union sympathies; by confiscating union literature; by threatening employees that benefits would be withheld and with the imposition of more onerous working conditions; by telling employees they were being transferred to the payroll of a temporary employment service to discourage support for the Union; and by telling employees the payroll transfer was done to ''scare'' them off the Union, Respondent has interfered with, restrained, and coerced employees in the exercise of the rights guaranteed them by Section 7 of the Act, and thereby has engaged in unfair labor practices in violation of Section 8(a)(l) of the Act.

5. By laying off all 21 day shift plating department bargaining unit employees on July 19 and by discriminatorily delaying the recall of employees suspected of having union sympathies, because of employee union activities (including specifically, the delivery of a petition pertaining to wages and benefits to the company president), in pursuing union affiliation for purposes of collective-bargaining representation, Respondent violated Section 8(a)(3) and (1) of the Act.

6. By suspending and terminating employees Keith Mills, Michael Proffitt, and Lisa Nixon because of or in retaliation for the employees' union activities, Respondent violated Section 8(a)(1) and (3) of the Act.

7. By first delaying expected wage raises on review and vacations, then timing an increase in these same benefits shortly after it made a discriminatory mass layoff of 21 employees and suspended the leading union spokesmen, all during the course of a union campaign, Respondent has engaged in unfair labor practices in violation of Section 8(a)(3) and (5) of the Act.

8. By promulgating an employee handbook with unilateral changes in terms and conditions of employment subsequent to the Union's card majority demand for recognition without notice to or bargaining with the Union, Respondent has violated Section 8(a)(1) and (5) of the Act.

9. From April 18, 1991, a majority of the unit designated and selected the Union as their representative for the purposes of collective bargaining and, at all times since, the Union, by virtue of Section 9(a) of the Act, has been, and is, the exclusive representative of the unit for the purposes of collective bargaining with respect to rates of pay, wages, hours of employment, and other terms and conditions of employment.

10. By failing and refusing to recognize and bargain with the Union on and since April 18, 1991, while engaging in unfair labor practices which undermined the Union's majority status and which would impede the election process, the Respondent violated Section 8(a)(1) and (5) of the Act.

11. The challenged ballots of employees Robert Husslein, Paul Plonka, Stephen Iggens, Jason Rothwell, and Raymond Tippet from the election on June 21, 1991, should be counted, resulting in the issuance of a Certification of Results in Case 30–RC–5250.

12. The unfair labor practices found above were independently, substantially, and pervasively disruptive of the election process, preclude a fair election, and warrant an order to bargain.

13. Staff Right, Inc. is not a joint employer for purposes of the remedy here.

14. Except as found here, Respondent is not shown to have engaged in any other unfair labor practices as alleged in the complaint.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I find it necessary to order it to cease

and desist and to take certain affirmative action designed to effectuate the policies of the Act.

Inasmuch as I found that Respondent violated the Act by laying off 21 bargaining unit employees and thereafter specifically illegally terminating employees Lisa Nixon, Keith Mills, and Michael Proffitt, I find it necessary to order that Respondent be required to reinstate these employees not already reinstated in order to restore the status quo ante existing prior to its commission of this unfair practice and to make all of them whole for the time on layoff on and after July 19, 1991.

With respect to the necessary affirmative action, it is recommended that Respondent be ordered to reinstate the three named terminated employees to their former jobs or substantially equivalent positions and to recall any employees laid off on July 19, 1991, and not previously recalled and reinstated, without prejudice to their seniority or other rights and privileges previously enjoyed, and make them whole for any loss of earnings they may have suffered because of the discrimination practiced against them by payment to them of a sum of money equal to that which they normally would have earned from the date of the discrimination to the date of reinstatement, in accordance with the method set forth in *F. W. Woolworth Co*., 90 NLRB 289 (1950), with interest, as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987),[10] and that Respondent expunge from its files any reference to their layoff or termination and notify them in writing that this has been done and that evidence of the unlawful termination will not be used as a basis for future personnel action against them.

Because a failure to grant a bargaining order as requested by the Charging Party, the General Counsel would reward Respondent for its wrongdoing, *Impact Industries*, 285 NLRB 5 (1987), and as the Respondent has engaged in misconduct that otherwise demonstrates the need for a *Gissel* order, I recommend that the Respondent be required to recognize and bargain with the Union and, if an agreement is reached, to reduce the agreement to a written contract.

Otherwise, it is not considered to be necessary that a broad order be issued.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[11]

ORDER

The Respondent, America's Best Quality Coatings Corp., Milwaukee, Wisconsin, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Terminating or laying off any employees or otherwise discriminating against them in retaliation for engaging in union activities or other protected concerted activities.

(b) Interfering with, restraining, or coercing its employees in the exercise of the rights guaranteed them by Section 7 of the Act by interrogating employees concerning their union sympathies, confiscating union literature, threatening employees that benefits would be withheld and that it would impose more onerous working conditions, and telling employees they were transferred to the payroll of a temporary employment service to scare them off the Union.

(c) Delaying expected wage increases or reviews and vacations or giving such benefits in a manner that interferes with employees' Section 7 rights.

(d) Promulgating rules or an employee handbook with unilateral changes in terms and conditions of employment subsequent to the Union's majority demand for recognition without notice to or bargaining with the Union.

(e) Failing and refusing to recognize and bargain with the Union, while engaging in unfair labor practices after the Union has established majority status.

(f) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Offer Keith Mills, Michael Proffitt, Lisa Nixon, and all bargaining unit members of the day shift plating department employees laid off or terminated on or after July 19, 1991, immediate and full reinstatement and make them whole for the losses they incurred as a result of the discrimination practiced against them, including wage increases and vacation benefits that may have been illegally delayed or not provided, in the manner specified in the remedy section above and expunge from its files any reference to their termination and notify them in writing that this has been done and that evidence of the unlawful termination will not be used as a basis for future personnel actions against them.

(b) Recognize and, on request, bargain collectively with the Union as the exclusive collective-bargaining representative of its employees in the following appropriate unit with respect to rates of pay, wages, hours, and other terms and conditions of employment and, if an agreement is reached, embody it in a signed agreement:

> All full-time and regular part-time production and maintenance employees, including warehouse employees of the Respondent, employed at America's Best Quality Coatings Corp. facility in Milwaukee, Wisconsin; but excluding all office clerical employees, professional employees, guards and supervisors as defined in the Act.

(c) On request of the Union, rescind any departures from terms and conditions of employment that were unilaterally made by the Respondent on or after April 18, 1991, retroactively restoring preexisting terms and conditions of employment, excluding any retroactive reduction in wage rates.

(d) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(e) Post at its Milwaukee, Wisconsin facility and mail to all employees who were laid off on July 19 and/or subsequently terminated, copies of the attached notice marked

[10] Under *New Horizons*, interest is computed at the ''short-term Federal rate'' for the underpayment of taxes as set out in the 1986 amendment to 26 U.S.C. § 6621.

[11] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

''Appendix.''[12] Copies of the notice, on forms provided by the Regional Director for Region 30, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(f) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

IT IS FURTHER ORDERED that Case 30–RC–5250 be remanded to the Regional Director for Region 30 for such further action as is deemed necessary based on the findings and conclusions here.

[12] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading ''Posted by Order of the National Labor Relations Board'' shall read ''Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.''